Office-Supreme Court, U.S.
FILED
NOV 17 1965
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 582

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

REPLY BRIEF

JOHN H. CANTRELL
2120 First National Building
Oklahoma City, Oklahoma

JAMES D. BATCHELOR
707 North Robinson
Oklahoma City, Oklahoma

Attorneys for Petitioners

November, 1965

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

INDEX

PAGE

I—S & H may not obtain the aid of a court in equity to enforce the precise conduct made unlawful by the Sherman and Clayton Acts ____ 1

II—The provision of the S & H licensing agreement which attempts to retain title to the stamps issued by S & H is invalid under the Sherman and Clayton Acts ____ 5

Conclusion ____ 7

CITATIONS

Cases:

Connelly v. Union Sewer Pipe Co., 184 U.S. 540 ____ 3

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 ____ 4

Fuller v. Berger, 120 Fed. 274 ____ 3

International News Service v. Associated Press, 248 U.S. 215 ____ 3

Kelly v. Kosuga, 358 U.S. 516 ____ 3

Revlon, Inc. v. Pharmacy, Inc., 29 F.R.D. 169 ____ 3-4

Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U.S. 165 ____ 3

Statutes:

Clayton Act, § 3, 15 U.S.C. § 14 (1958) ____ 1, 2, 4, 5

Sherman Act, § 1, U.S.C. § 1 (1958) ____ 1, 2, 4, 5

No. 582

In the Supreme Court of the United States

OCTOBER TERM, 1965

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

REPLY BRIEF

I

S & H may not obtain the aid of a court in equity to enforce the precise conduct made unlawful by the Sherman and Clayton Acts.

For the first time in this case, the Sperry & Hutchinson Company (S&H) now contends that it is entitled to enforce, by means of injunction, contractual provisions which violate the Sherman and Clayton Acts. (Brief in Opposition, Point II, 9-11). This novel contention represents a grave threat to the effectiveness of the antitrust laws. It is imperative that this Court grant certiorari and dispose of this contention.

The thrust of this new argument is that S & H may base its claim to relief on an unlawful contractual pro-

vision, enforce it by means of injunction against those not parties to the agreement, and then preclude relief for such third parties either by defense or counterclaim. Although this theory is most advantageous to S & H, it is completely without merit or support under the decisions of this Court.

Let it be remembered that in this action, the claim of unfair competition (alleged by S & H) does not involve any use of a trademark, trade name, copyright, misleading advertising or the like. The sole basis for such a claim is that, by contract between S & H and its retailer-licensees, S & H has attempted to retain title to the stamps it issues and thereby seeks to prevent their transfer by members of the public and the Rances. There is no other possible basis for the claim of unfair competition.

The Rances defended this action and, further, sought injunctive relief by counterclaim against S & H on the ground that the attempt to retain title to the stamps and thereby prevent transfer is an essential element in a scheme of illegal tying arrangements and retroactive price-fixing combinations. At no prior point in this action has S & H suggested, much less argued, that it is entitled to enforce violation of the Sherman and Clayton Acts by means of injunction.

In support of this new contention S & H asserts the applicability of six cases. But contrary to such assertions, not one supports the point urged by S & H.

Three cases hold that a violation of the antitrust laws will not preclude recovery of the purchase price of goods sold pursuant to contract which itself is not unlawful.

Kelly v. *Kosuga*, 358 U.S. 516, *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165, *Connelly* v. *Union Sewer Pipe Co.*, 184 U.S. 540. In each of these cases, this Court took care to point out that enforcement of a contract will be denied where to rule otherwise would sanction and give effect to a violation of the antitrust laws inhering in the contract sought to be enforced. The case at bar falls squarely within the exception delineated by this Court. Furthermore, neither the Rances nor customers of S & H licensee-retailers are parties to the licensee contracts.

Fuller v. *Berger*, 120 Fed. 274, relied on by S & H, did not involve any issue of antitrust law.

Two cases relied upon by S & H are actions to enjoin unfair competition. *International News Service* v. *Associated Press*, 248 U.S. 215, holds that there is a common law right to prevent unfair competition. But here, S & H does not base its claim upon any common law right but only on the provision of the licensee contract by which it attempts to retain title. Also, *Revlon, Inc.* v. *Pharmacy, Inc.*, 29 F.R.D. 169, holds that violation of the antitrust laws is no defense to an action for unfair competition based on common law or statutory rights. The holding is wholly inapposite here *since S & H relies solely on the provisions of the licensee agreement.* S & H quotes the following passage from the *Revlon* case, which specifically excepts from its holding the type of case here presented.

> "In any event, an antitrust violation does not destroy the participant's right to be protected from unfair competition *unless the participant is seeking the aid of a court in equity to perpetuate an illegal sys-*

tem." (Emphasis added.) 29 F.R.D. at 177. (Brief in Opposition, 10).

What S & H here seeks is to enforce the precise conduct made unlawful by the Sherman and Clayton Acts.

The case dispositive of this issue is *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, which holds that a participant in a scheme of contracts unlawful under the Sherman Act is not entitled to restrain third persons from inducing breaches of such contracts. Since S & H seeks in this action to restrain the Rances (third parties) based on the unlawful provisions of the licensee contract, this rule is squarely applicable.

In addition, the language of Section 1 of the Sherman Act and Section 3 of the Clayton Act requires rejection of the S & H argument. The language of both sections states that contracts violative of their terms are invalid (15 U.S.C., §§ 1, 14).

Finally, to adopt the argument urged by S & H would mean that illegal schemes could receive the aid of our courts to enforce their unlawful purposes. Defendants, not parties to the schemes, would become victim of the unlawful contracts creating the schemes. Where the damage is caused by an injunction, as is the case here, no recourse would be available. Unable to sue prior to damage, the private individual would be precluded from a defense when sued. The fundamental tenets of fair play require rejection of respondent's argument and necessitate consideration of this case by the Court.

II

The provision of the S & H licensing agreement which attempts to retain title to the stamps issued by S & H is invalid under the Sherman and Clayton Acts.

The Rances' basic proposition is that the attempt by S & H to prevent transfer of trading stamps by the Rances and by customers of S & H licensee-retailers is an essential element in a scheme of illegal tying arrangements and retroactive price fixing. To this proposition, the Brief in Opposition offers only an indirect and dissembling response (Brief in Opposition, Point I, 5-9).

S & H argues that the trading stamps are simply a legitimate promotional device. But S & H ignores the distinction between lawful promotion activities (such as advertising, trade name, competitive values, *etc.*) and the unlawful imposition of market restraints (specifically the attempted retention of title to prevent transfer of the stamps, forced rate of distribution, absence of fixed cash value, and retroactive fixing of redemption rates). These market restraints, not required for legitimate promotional purposes, bring the S & H licensing agreement within the sphere of condemned activity under Section 1 of the Sherman Act and Section 3 of the Clayton Act.

It is not urged that trading stamps are unlawful *per se*, but rather that the attempt to restrain transfer of the stamps by providing for retention of title is an onerous market restraint when viewed in light of the other provisions of the S & H licensing agreement.

S & H argues that there is no unlawful tying arrangement because, it says, ". . . there is no second, separate

product sold . . ." (Brief in Opposition, 6). In using the argument, S & H ignores the fact that the trading stamps represent but one right, the right to redeem for S & H merchandise. Perhaps this oversight was intentional since it would strain credulity to accept a proposition that S & H merchandise is not a second separate product.

S & H also argues that there can be no sale of stamps since the State Court held that S & H at all times retained title to the stamps (Brief in Opposition, 6). By this semantic slight of hand S & H attempts to justify the decision of the State Court by assuming the correctness of the decision. A tautology hardly constitutes supporting argument!

Next S & H argues that it has no market dominance since it does not have control over any patented product (Brief in Opposition, 7). This argument likewise misses the point: S & H has a "not insubstantial" impact on interstate commerce by reason of its contracts with more than 70,000 retailer-licensees, and this market impact is heightened by reason of the advantages derived from the patented products which the licensees sell and the trade names they employ.

Finally, in response to the Rances' proposition that S & H engages in retroactive price fixing, S & H merely claims that compelling the rate of distribution of the stamps and later fixing redemption values is not retroactive price fixing (Brief in Opposition, 8, 9). This bald assertion is no where supported by legal authority nor is it bolstered by any discussion of the applicable legal princi-

ples. Such response seems to be an implicit admission of the validity of the Rances' point.

CONCLUSION

The licensing agreement employed by S & H established a scheme in violation of the antitrust laws. The essential element of the scheme, here in question, is the attempted retention of title for the purpose of preventing transfer of the stamps after they enter the channels of commerce. The unwarranted market restraint achieves an illegal tying agreement and a retroactive price fixing vertical combination.

Therefore, the Rances respectfully request that the writ of certiorari be granted and urge that the decision of the lower court be reversed.

Respectfully submitted,

JOHN H. CANTRELL
2120 First National Building
Oklahoma City, Oklahoma

JAMES D. BATCHELOR
707 North Robinson
Oklahoma City, Oklahoma

Attorneys for Petitioners

November, 1965